

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

FILED
01/27/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
40E-0030-R-2022
Ostrem, Eyvind
9.00

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
AND FORT PECK DAM - BASIN (40E)
PRELIMINARY DECREE

CLAIMANT: Wesley Koss

OBJECTOR: United States of America (Bureau of Land
Management)

NOTICE OF INTENT TO APPEAR: Wesley Koss

CASE 40E-0030-R-2022
40E 38987-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water right claim 40E 38987-00 appeared in the Preliminary Decree for the Missouri River Between Musselshell River and Fort Peck Dam (Basin 40E) issued October 7, 2020. The claim received an objection from the United States Bureau of Land Management (United States), a Notice of Intent to Appear from the Claimant, and issue remarks from the DNRC during its review in preparation of the Preliminary Decree indicating potential legal or factual issues with the claim. The claim was consolidated into case 40E-0030-R-2022 to resolve the issue remarks and objection.

On August 2, 2022, the Claimant and the United States submitted a Stipulation to Resolve Objections (Stipulation), which states that upon entry of a ruling and final order reflecting the reflected changes, the United States' objections to claim 40E 38987-00 shall be deemed resolved.

FINDINGS OF FACT

1. Claim 40E 38987-00 is an irrigation claim to a reservoir on an unnamed tributary of Second Creek. The claim is based on a Notice of Appropriation filed by Lark Wilson for all the water from the claimed coulee. When Edwin Koss filed the October 21, 1981 Statement of Claim, he claimed a volume of 757.5 acre feet per year. No objections were filed to that volume at the Preliminary Decree, but the claim received the following issue remark from the DNRC as the result of its review in preparation of the decree:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE.
THE CLAIMED VOLUME EQUALS 6.33 TIMES THE CAPACITY OF THE RESERVOIR.

2. The Court requested evidence from the Claimant supporting the claimed volume, and on October 19, 2022, Claimant Wesley Koss filed an Affidavit stating that based on conversations with his uncle, Paul Koss, and his experiences with the water right, the 757.50 acre-foot maximum volume is based on the original claimant's best estimate of the maximum volume that could be put to beneficial use via the dam in a year. He states that "in a perfect year, the dam may fill up and be emptied several times for irrigation which would reach the 757.50 AC-FT claimed." Affidavit at 1. Absent evidence to the contrary, the claimed volume is sufficiently supported.

3. Pursuant to the Stipulation between Mr. Koss and the United States, the following refinement to the claim's place of use should be made to exclude federal land that is not part of the claim:

<u>ID</u>	<u>Acres</u>	<u>Govt</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	310.00			29	24N	31E	PHILLIPS
2	165.00			20	24N	31E	PHILLIPS
3	30.00		<u>NESE</u>	30	24N	31E	PHILLIPS
Total:	<u>505.00</u>						

4. Finally, the claim also received the following remarks that serve only to provide notice to water users (Notice Only Remarks):

THIS INTERBASIN TRANSFER CLAIM WAS NOT INCLUDED IN THE 40M BASIN PRELIMINARY DECREE ISSUED 03/20/2009.

RESERVOIR RECORD WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

PRINCIPLES OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

2. The claimant of a water right claim may waive the advantage of § 85-2-227, MCA. If a claimant agrees to reduce or limit an element of a claim, the water court does not need to determine whether the burden of proof has been met. The water court may accept a claimant's requested reduction or limitation without further presentation of evidence, unless there is an unresolved issue remark on the claim, in which case § 85-2-248, MCA, must be applied. Rule 17 (c), W.R.Adj.R.2.

CONCLUSIONS OF LAW

1. The claimed volume is supported by a preponderance of the evidence. The volume issue remark should be removed from the claim. The Notice Only Remarks do not raise legal or factual issues for the Court to resolve and should be removed from the claims.

2. The Stipulation's requested changes are reductions that can be accepted without analysis of the burden of proof. The Stipulation is accepted, and the modifications described in Finding of Fact No. 3 above should be made. These modifications resolve the United States' objections.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the above-described modifications.

A post-decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail

Eve W McDonald, Trial Atty
US DOJ-ENRD
999 18th St, So Terrace, Ste 370
Denver, CO 80202
(303) 844-1381(Eve)
Evelyn.mcdonald@usdoj.gov
MontanaBasins.ENRD@USDOJ.GOV

Mark Widerschein, Trial Attorney
NRS-ENRD US DOJ
PO Box 7611
Ben Franklin Station
Washington, DC 20044-7611
(202) 532-5803
mark.widerschein@usdoj.gov
MontanaBasins.ENRD@USDOJ.GOV

Service via USPS Mail

Edward A Amestoy
Dan O'Brien
Cole Amestoy & O'Brien PLLP
PO Box 1280
Malta, MT 59538
406-654-2541

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: 40E 38987-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: WESLEY KOSS
36198 REGINA RD
MALTA, MT 59538 9528

Priority Date: MARCH 21, 1936

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 757.50 AC-FT

Climatic Area: 1 - HIGH

Maximum Acres: 505.00

Source Name: UNNAMED TRIBUTARY OF SECOND CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESENE	30	24N	31E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM **Reservoir Name:** STRATTON RESERVOIR

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESENE	30	24N	31E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 14.00 FEET

Depth: 11.00 FEET

Surface Area: 27.19 ACRES

Capacity: 119.64 ACRE-FEET

THE DAM EXTENDS INTO THE N2NESE , SEC 30 TWP 27N RGE 31E PHILLIPS COUNTY.

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	310.00			29	24N	31E	PHILLIPS
2	165.00			20	24N	31E	PHILLIPS

3	30.00	NESE	30	24N	31E	PHILLIPS
Total:	505.00					

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

38986-00 38987-00 186510-00 186511-00

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME PLACE OF USE.

3373-00 38986-00 38987-00

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME RESERVOIR.

3373-00 38987-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE ASSOCIATED. THEY SHARE THE SAME PLACE OF USE AND RESERVOIR. 40E P003373-00, 40E W038987-00.

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM DRAINAGE (BASIN 40E) AND USES IT IN THE MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM DRAINAGE (BASIN 40E) AND THE BEAVER CREEK, TRIBUTARY TO MILK RIVER DRAINAGE (BASIN 40M). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER THE POINT OF DIVERSION OR PLACE OF USE BASIN.